(11)

No. 06-313

FILED
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SUPREME COURT, U.S.

In the
SUPREME COURT OF THE UNITED STATES

DONALD ROPER, SUPERINTENDENT,
POTOSI CORRECTIONAL CENTER,

Petitioner,
vs.
WILLIAM WEAVER

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent asks leave to file the attached Brief in Opposition To Petition for Writ of Certiorari to proceed *in forma pauperis*.

Respondent has previously been granted leave to proceed *in forma pauperis* in the United States District Court for the Eastern District of Missouri and the United States Court of Appeals for the Eighth Circuit.

No such affidavit is attached, inasmuch as the United States District Court appointed counsel for respondent under 18 U.S.C. § 3006(a)(2)(B) and 28 U.S.C. 848(q)(4)(B).

Dated: October 4th, 2006

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(11)

No. 06-313
(CAPITAL CASE)

In the
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

WILLIAM WEAVER,
Respondent,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

(CAPITAL CASE)

Whether the United States Supreme Court should review a claim that the lower courts erred in finding that the Missouri Supreme Court unreasonably applied this Court's precedent on penalty phase closing arguments when said determination rests solidly upon prior Supreme Court decisions and prior circuit case decisions interpreting those Supreme Court cases?

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Petitioner alleges that the United States Court of Appeals for the Eighth Circuit erred in finding that the Missouri Supreme Court unreasonably applied this Court's precedent as well as prior circuit decisions interpreting United States Supreme Court cases that dealt with prejudicial and inflammatory penalty phase arguments. Petitioner contends that the Missouri Supreme Court decision was "not contrary to or an unreasonable application of Supreme Court precedent." In essence, the petitioner simply disagrees with the Eighth Circuit Court of Appeals panel majority decision. Furthermore, the petitioner reargues the same issues this Court previously refused to hear in *Copeland v. Washington*, 232 F.3d 969 (8th Cir. 2000), *cert. denied*, 532 U.S. 1024 (2001).

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STATEMENT OF THE CASE

Mr. Weaver was charged in the Circuit Court of the County of St. Louis with the first degree murder of Charles Taylor. Mr. Weaver was charged with committing this murder with his co-defendant, Dale Shurn. Mr. Weaver was found guilty of the first degree murder of Charles Taylor and sentenced to die by lethal gas or lethal injection.

At trial, the state presented its theory that Mr. Weaver's involvement in the event was that he was acting as an agent for his co-defendant, Darryl Shurn, in shooting Charles Taylor. Prior to his death, Charles Taylor was cooperating with federal prosecutors relating to drug charges pending against Larry and Charles Shurn, relatives of Darryl Shurn. There was no direct link between Mr. Weaver and Charles Taylor ever established at trial.

The prosecution relied upon word on the street that Darryl Shurn planned to kill Charles Taylor because of his anticipated testimony, and the testimony of a St. Louis County jail inmate who testified that Mr. Weaver admitted to him while they were in custody that he, along with Darryl Shurn, had killed Charles Taylor. The St. Louis County jail inmate received a substantial reduction in his sentence for his testimony. This "deal" between the state prosecutor and the snitch, Dutch Tabler, was never

disclosed to Mr. Weaver's trial attorney.

In short, the state relied solely on circumstantial evidence in its presentation of its case against Mr. Weaver. During the guilt phase closing argument, the prosecutor asserted his personal beliefs, threatened the jury, and attacked the defense attorney's credibility. During the penalty phase closing argument, the prosecutor asked the jurors to kill the petitioner, emphasized his position of authority, asked the jury to send a message to all drug dealers and murderers everywhere, and compared the role of the jury to that of soldiers carrying out duties in wartime.

OPINIONS BELOW AND JURISDICTION

Mr. Weaver's conviction and sentence were upheld by the Missouri Supreme Court. *State v. Weaver*, 912 S.W.2d 499 (Mo. 1995). Mr. Weaver thereafter filed a petition for writ of habeas corpus with the United States District Court for the Eastern District of Missouri. Mr. Weaver's petition was subsequently granted by the Honorable Charles E. Shaw, United States District Judge. *Weaver v. Bowersox*, Case No. 4:96CV774CAS EDMO. (Pet. App. A-203).

The United States Court of Appeals for the Eighth Circuit reversed the district court's decision that a *Batson v. Kentucky* error had occurred, and remanded the petition for consideration of the remaining issues in the petition. *Weaver v. Bowersox*, 241 F.3d 1024 (8th Cir. 2001) (Pet. App. A-187). On remand, the district court again granted relief

as to the penalty phase arguments. The court held that the penalty phase arguments were wholly inflammatory, and the Missouri State Supreme Court decision was an unreasonable application of clearly established Supreme Court precedent and well established federal law.

The Eighth Circuit Court of Appeals upheld the decision of the district court, finding that the prosecutor's penalty phase arguments violated the United States Constitution. On May 31, 2006, the Court of Appeals denied petitioner's request for rehearing, and denied petitioner's request for hearing en banc.

The petition for writ of certiorari was placed on the Supreme Court docket on September 5, 2006. In accordance with Supreme Court Rule 15, Respondent filed his brief in opposition. This Court has jurisdiction under 28 U.S.C. §1254(1) 2000.

REASONS WRIT SHOULD BE DENIED

Petitioner alleges that the United States Court of Appeals for the Eighth Circuit erred in finding that the Missouri Supreme Court unreasonably applied this Court's precedent as well as prior circuit decisions interpreting United States Supreme Court cases that dealt with prejudicial and inflammatory penalty phase arguments. The petitioner simply contends that the Missouri Supreme Court decision was "not contrary to or an unreasonable application of Supreme Court precedent." In essence, the petitioner

simply disagrees with the Eighth Circuit Court of Appeals panel majority decision. Furthermore, the petitioner reargues the same issues this Court previously refused to hear in *Copeland v. Washington*, 232 F.3d 969 (8th Cir. 2000), *cert. denied*, 532 U.S. 1024 (2001).

Petitioner's application for the writ is based solely upon its disagreement with the determination of the Eighth Circuit Court of Appeals. This is an argument that has been advanced by petitioner, previously rejected by the circuit, and rejected by this Court. The panel opinion correctly concludes that the district court's grant of habeas relief should be upheld. The panel majority in so holding found that certain portions of the prosecutor's closing argument violated due process.

The panel majority also correctly noted that the Eighth Circuit has previously vacated death sentences in the two other cases tried by this prosecutor for similar reasons as those alleged by Weaver in his habeas petition. The panel majority went on to explain how the types of statements made in this case violated respondent's rights, and in its holding that the grant of Mr. Weaver's habeas petition was necessary:

> Category (1) was impermissible because it was "calculated to remove reason and responsibility from the sentencing process," and because describing jurors as soldiers with a duty avicerates the concept of discretion afforded to a jury as required by the Eighth Amendment, Categories (2), (4), and (5) were improper because statements about the prosecutor's personal belief in the death penalty are inappropriate and contrary to a reasoned opinion by the jury, because a prosecutor should not emphasize his or her position of authority making death penalty determinations because it may encourage the jury to defer to the prosecutor's judgment,

> and because arguments against a rational decision by the jury, and specifically those that implore the jury to kill the defendant immediately, are contrary to a fair proceeding; and Category (3) was impermissible because the argument that a signal must be sent from one case to effect other cases puts an improper burden on the defendant because it permits an individual determination of the appropriateness of capital punishment and because invoking a jury's general fear of crime to encourage the application of the death penalty in a particular case is unfairly inflammatory. (Pet. App. A-13).

Under AEDPA, (Antiterrorism Effective Death Penalty Act of 1996), a court should grant relief if a decision is contrary to or involves an unreasonable application of clearly established federal law, or a decision is based on an unreasonable determination of the facts in light of the evidence presented. *Williams v. Taylor*, 529 U.S. 326 (2000). The petitioner reads this passage to demand that there shall be a United States Supreme Court decision clearly on all fours with a particular question, for any state court decision to be contrary to that decision. Were this the case, it would be impossible for the circuit to decide any issue. *Williams* at 337, n. 9.

In *Van Patten v. Deppsich*, 434 F.3d 1038 (7th Cir. 2006), the Seventh Circuit granted relief in a Wisconsin intentional homicide case finding that Defendant's right to counsel was violated when he went forward with a change of plea hearing while his attorney participated by telephone. This was a case of first impression for the Seventh Circuit, and because of the non-physical presence of the petitioner's attorney, the court concluded that the fact pattern gave rise to a violation of *United States v. Cronic*, 466

U.S. 648 (1984).

In *Van Patton*, the state argued that the state court's denial of relief was contrary to federal law because the Supreme Court had never decided a case involving counsel's participation in a plea hearing by telephone. The Seventh Circuit correctly turned aside the state's argument, explaining that the argument misapprehends the AEDPA regime. Factual context of cases may be regarded as materially indistinguishable because their legal implications are clearly the same, notwithstanding the facts themselves are significantly different. *Van Patten* at 1042; Note 2 (quoting Randy Hertz and James S. Liebman, Federal Habeas Corpus Practice and Procedure, 1439 n. 24 4th Ed. 2001). *See also, Williams v. Bowersox*, 340 F.3d 667 (8th Cir. 2003); *Matteo v. Superintendent SCI Albion*, 171 F.3d 877 (3rd Cir. 1999), cert. denied, 528, U.S. 824 (1999).

Finally, the panel majority correctly reviewed two particularly significant cases: *Newlon v. Armontnout*, 885 F2d. 1328 (8th Cir. 1989), cert. denied, 497 U.S. 1039 (1990) and *Shurn v. Delo*, 177 F 3d. 662 (8th Cir. 1999), cert. denied, 528 U.S. 1010 (1999). In both cases it was the same prosecutor as in the present case, and almost identical closing arguments were made. The sentences in both cases were vacated due to improper closing arguments. Clearly, *Newlon* and *Shurn* provide an important framework for analysis of the closing argument. The petitioner's contention that the Court of Appeals cannot rely on its own precedent, together with Supreme Court precedent, is without merit.

Petitioner contends that this Court's grant of certiorari in *Musladin v. Lamarque*, 427 F.3d 653 (9th Cir. 2005), would, in some fashion, be important to the determination of whether to grant the writ in the instant case. *Musladin* involved a situation where several family members of that individual killed by Musladin wore buttons on their shirts with the deceased's photograph on the buttons. The reviewing courts in *Musladin* found that the buttons were several inches in diameter and very noticeable. Furthermore, the family members were seated in a row directly behind the prosecution and in the clear view of the jury.

In arriving at its decision that Mr. Musladin's due process rights to a fair trial by an impartial jury free from outside influences had been violated, the *Musladin* court relied on clearly established federal law, specifically, this Court's decision in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), when an "unacceptable risk is presented of impermissible factors coming into play," there is an "inherent prejudice" to a defendant's constitutional right to a fair trial and reversal is required. The *Musladin* court felt that the issue of the buttons was factually similar with that of compelling a criminal defendant to wear prison garb and shackles before the jury, a practice that has been condemned by this Court. *Estelle v. Williams*, 425 U.S. 501 (1976). The issue in *Musladin* is not the prosecutorial misconduct that occurred in Mr. Weaver's case, it is factors external to the trial of a defendant that effect the defendant's ability to obtain a fair trial. Petitioner's request to

somehow claim that this Court's decision in the *Musladin* case could somehow effect the decision below in the instant case is in error.

In the present case, the petitioner's contention that habeas relief can be granted only when a state's decision is in conflict with Supreme Court precedent that matches as to law and fact is without support. *See Williams* at 377; Note 9. This argument has been previously advanced and refused to hear by this Court. *Copeland v. Washington*, 232 F.3d 969, 974 (8th Cir. 2000) cert. denied, 532, U.S. 1024(2001).

The petitioner further contends the panel majority incorrectly relied on the circuit's own precedent in determining whether habeas relief should be granted. This argument is without merit. This issue was previously reviewed in *Copeland* where the court stated, "to the extent that inferior federal courts have decided factually similar cases, references to those decisions are appropriate in assessing the reasonableness . . . of the state court's treatment of the contested issue. *Copeland* at 974.

It is important to note the circuit's decision in the *Copeland* case, wherein petitioner made exactly the same argument as petitioner raises today:

> The state next argues that because the Supreme Court has not discussed the impact of a prosecutor's improper closing argument during the penalty phase of a 974 capital case, AEDPA bars the petitioner's claim. Contrary to the state's assertion, it is apparent to us that there are Supreme Court decisions on penalty phase closing arguments, *See Caldwell v. Mississippi*, 472 U.S. 320, 340, n. 7, 105 S.Ct. 2633, 86 L.Ed. 2d 231 (1985) (death sentence vacated because prosecutor's improper closing argument during penalty phase made it appear to jury that responsibility for the death penalty would be borne by appellate court rather than by jury itself); *Romano v.*

> *Oklahoma*, 512 U.S. 1, 3, 114 S.Ct. 2004, 129 L.Ed.2 (1994) (considering petitioner's assertion that closing argument in capital sentencing hearing violated petitioner's due process rights, although concluding on the facts that no rights were violated). There are also Supreme Court decisions on guilt phase closing arguments that are relevant. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) (concluding that improper closing argument in guilt phase reaches level of constitutional error if prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process"); *Darden v. Wainwright*, 477 U.S.. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2 144 (1986) (same). Further, in *Paxton v. Ward*, 199 F.3d 1197, 1717-18 (10th Cir. 1999), the Tenth Circuit considered a claim regarding an improper closing argument in the penalty phase of a capital case. While discussing the highly deferential standard of review under AEDPA at some length, the Tenth Circuit concluded that the closing argument constituted prosecutorial misconduct and warranted relief. Therefore, despite the state's claim that there is no precedent on penalty phase closing arguments, the Supreme Court cases demonstrate otherwise.

Copeland at 969.

Petitioner also argues the prosecutor's penalty phase closing argument on the merits was reasonable as determined by the Missouri Supreme Court. However, it is difficult to imagine a more inflammatory closing argument by a prosecutor.

As stated previously, the Court of Appeals examined five categories (Pet. App.A-13) of improper arguments and found each argument inflammatory. The categories covered a broad range of impermissible arguments. The prosecutor argued his personal beliefs, appealed to the juror's fears and emotions and threatened the jury to return a verdict of death. (Pet. App. A. 57-72). The jury in this case was subjected to a "relentless, focused, uncorrected argument... calculated to remove reason and

responsibility from the sentencing process." *Newlon*, 885 F.2nd at 1338.

Once again it is important to note that the prosecutor in the present case tried two previous capital punishment cases. In both cases the sentences were vacated due to improper arguments in the penalty phase. *Newlon v. Armontrout*, 884 F.2d 1328 (8th Cir. 1989); *Shurn v. Delo*, 177 F.3d 662 (8th Cir. 1999). Almost identical arguments were made in the present case and therefore the conclusion by the Court of Appeals was appropriately the same. The prosecutor's argument was so inflammatory it "infected the trial with unfairness." *Darden v. Wainwright*, 477, U.S. 168, 181 (1986).

The Court of Appeals correctly affirmed the district court and held the Missouri Supreme Court decision was unreasonable under existing United States Supreme Court precedent.

CONCLUSION

The petition for writ of certiorari should be denied.

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